

**BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI.**

- I. THE LAW OF THE CASE IS THE ACT OF CONGRESS OF JUNE 19, 1934 AND RULE 80 OF THE RULES OF CIVIL PROCEDURE PRESCRIBED BY THIS COURT THEREUNDER AND NOT R. S. 1765 AND 31 STAT. 158.**

The decision of the Circuit Court of Appeals rests upon the proposition that because R. S. 1765 prohibits a public officer from receiving additional pay or compensation, a court reporter of the District Court of Hawaii, originally appointed under 31 Stat. 158, can be compelled to furnish free transcripts to the United States, as a litigant in a civil case.

The Court holds this to be so even though the long established rule of the Court in which petitioner serves and has served for many years provide he shall be paid.

R. S. 1765, U.S.C. 70, provides:

“No officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance or compensation.”

The decision of the Circuit Court of Appeals ignores the fact that Rule 80 of the Federal Rules of Civil Procedure prescribed by this Honorable Court provides that the compensation of official court reporters

shall be fixed by the District Court in which such reporter serves and that said Rule 80 has itself the force of a statute.

Section (b) of said Rule 80 provides as follows:

“(b) *Official Stenographers.* Each district court may designate one or more *official court stenographers* for the district and *fix by rule of court the compensation which such stenographers shall be entitled to charge for their services*, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in *the discretion of the trial judge*. The work of the stenographers shall be so arranged as to avoid delay in furnishing transcripts ordered for the purposes of motions for new trial, for amended findings, or for appeals.” (Italics ours.)

Pursuant to said rule 80 the District Court which designated petitioner its official reporter has fixed by Rule 129 of that Court the compensation its reporter is entitled to charge for his services. Said Rule 129 is set forth in full at page 18 of the transcript herein as follows:

“The official court reporter shall report and keep a record of all actions and proceedings tried and held before this court. The compensation of the official court reporter shall, *in addition to his salary provided by law*, be \$10 per day and \$5 per half day for reporting in civil cases, and *twenty cents per folio for transcribing his notes, to be paid by the party requiring the transcript*. The per diem expenses in such cases shall be paid by the parties, in advance, excepting the United

States, and shall be taxable as costs in the case. *When the court shall require* a transcript of the reporter's notes in civil cases, the charge therefor shall be paid by the parties, excepting the United States and shall be taxable as costs in the case. When the court shall require a transcript of the reporter's notes in any criminal action or proceeding, such transcript shall be furnished free of charge." (Italics ours.)

Rule 129 of the U. S. Dist. Ct. for the Territory of Hawaii as amended March 26, 1934.

The decision of the Circuit Court of Appeals regards Rule 80 prescribed by this Honorable Court as well as said Rule 129 as mere rules of Court which must yield to the force of a statute. This conclusion ignores the fact that said Rule 80 under authority of which said Rule 129 is prescribed not only has itself the force and effect of a statute but the statute giving it such force and effect expressly repeals all other laws in conflict with said rule.

Section 1 of the Act of Congress of June 19, 1934, 48 Stat. 1064, 28 U.S.C.A. § 723b, provides:

"Rules in actions at law; Supreme Court authorized to make. The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months

after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect. *June 19, 1934.*" (Italics ours.)

As provided in this section, the Federal Rules of Civil Procedure are general rules for all the District Courts of the United States. Their whole purpose is to provide uniformity of procedure in all the District Courts so that there will not be one rule for the District of California and another for the District of Hawaii.

To insure this uniformity the Congress expressly provided that "thereafter all laws in conflict therewith shall be of no force or effect". Petitioner therefore submits that if there be a conflict between the Act creating the position of reporter of the United States District Court of Hawaii (48 U.S.C.A. Sec. 664) or R. S. 1765 upon which the decision of the Circuit Court of Appeals is bottomed, then said statutes are to that extent repealed and the law of the case is said Rule 80 prescribed by this Honorable Court and said Rule 129 authorized thereunder.

II. THE DECISION OF THE CIRCUIT COURT OF APPEALS DEPRIVES PETITIONER OF HIS PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE RIGHTS GUARANTEED HIM BY THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

"nor (shall any person) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use,

without just compensation." (5th Amend. Const. of the U.S.)

The Constitution makes no distinction between real and personal property (*Heflebower v. U. S.*, 21 Ct. Cl. 228 at 237).

A reporter's transcript is the private property of the reporter who has transcribed it from his notes. It is the subject of contract and a thing of value for which he is entitled to be paid. The preparation of a transcript involves time and labor which is usually the reporter's free time outside of Court sessions and after ordinary working hours.

The decision of the Circuit Court of Appeals denies petitioner any compensation for the *additional* time and labor involved in producing this transcript and by writ of mandate compels him to produce it. He cannot be compelled to produce it where it is not, as appears hereinafter, a part of the duties of his office to furnish free transcripts to litigants in civil cases.

Nor can he be compelled to produce it simply because the Executive Branch of the Government has failed to obtain from the Congress a proper appropriation out of which he can be paid.

"No man can be compelled to give his time and labor, any more than his tangible property, to the public without compensation; and, since there is no mode by which policemen appointed by the commissioners can be compensated, it follows that no one, even after accepting their appointment, can be compelled to perform any police duties."

Hinze v. People ex rel., 92 Ill. 406, 424.

III. WHETHER PETITIONER BE AN OFFICER OF THE UNITED STATES OR NOT HIS DUTIES DO NOT REQUIRE HIM TO FURNISH FREE TRANSCRIPTS TO ANY LITIGANT, INCLUDING THE UNITED STATES.

The decision of the Circuit Court of Appeals holds petitioner to be an officer of the United States under the Act of Congress creating the position of reporter in the United States District Court for the Territory of Hawaii and granting that Court authority to make the appointment (*Oswald v. United States*, 96 Fed. (2d) 10).

That Act, 48 U.S.C.A. 644, provides in part as follows:

"The said district judges shall appoint a reporter of said court at a salary of \$1,200.00 per annum."*

The Act is silent as to the duties of such reporter. While denying the validity of Rule 129 of the District Court of Hawaii in reference to compensation, the Circuit Court of Appeals relies perforce upon that rule for a definition of these duties. The Court then goes on to place its own interpretation upon these duties as follows:

"* * * The duties of the official reporter are set forth in rule 129 of the lower court. The official reporter is required to report and keep a record of all actions and proceedings and to furnish transcripts of testimony where required, either by the parties or by the court. If he were not required

*Subsequently changed from time to time until the present when the classification calls for a salary of \$2,600.00 per annum (*Oswald v. U. S.*, supra).

to furnish transcripts of testimony, there would be no purpose in having a reporter; the notes must be read or transcribed at some time to be of any value at all. The purpose of having a stenographer report proceedings in the trial of a case is to make available a transcript of the testimony whenever required. It follows, as a matter of course, that the furnishing of transcripts of testimony is an ordinary duty of an official stenographic reporter and such services rendered by him are 'official services'."

Oswald v. U. S., 96 Fed. (2d) 10, 13.

Granting that the purpose of having a stenographer report proceedings in the trial of a case is to make available a transcript of the testimony if and when called for later, it does not follow that therefore anybody other than the Court is entitled to demand free transcripts.

The only official duty of the reporter under said Rule 129 to furnish free transcript in civil cases is when required to do so *by the Court* for the use of the Court which he serves.

Dated, San Francisco, California,

June 24, 1943.

Respectfully submitted,

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